

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
LYNCHBURG DIVISION**

|   |   |                                       |
|---|---|---------------------------------------|
| <b>RICHARD A. PLASTER,</b>                | ) |                                       |
| <b>Plaintiff,</b>                         | ) | <b>Civil Action No. 6:05cv00006</b>   |
|   | ) |                                       |
| v.  | ) |                                       |
|   | ) |                                       |
| <b>SHERIFF MIKE BROWN, <u>et al.</u>,</b> | ) |                                       |
| <b>Defendants.</b>                        | ) | <b>By: Hon. Michael F. Urbanski</b>   |
|   | ) | <b>United States Magistrate Judge</b> |
|   | ) |                                       |

**REPORT AND RECOMMENDATION**

Plaintiff Richard A. Plaster, proceeding pro se, brings this action under the Civil Rights Act, 42 U.S.C. § 1983, with jurisdiction vested under 28 U.S.C. § 1331. In his complaint, Plaster makes a number of claims under § 1983 for violations of plaintiff's constitutional rights under the Second, Fourth and Fourteenth Amendments of the United States Constitution. Plaster's claims arise out of his arrest and prosecution on felony charges following an incident on March 18, 2003. This matter is before the court for report and recommendation on motions to dismiss filed by two defendants.<sup>1</sup>

The first motion to dismiss was filed by defendant Commonwealth's Attorney Randy Krantz. For the reasons outlined below, it is the recommendation of the undersigned that this motion to dismiss be granted on the grounds of immunity. The second motion to dismiss was filed by defendant Sheriff Mike Brown. For the reasons outlined below, it is the recommendation of the undersigned that this motion to dismiss also be granted, as § 1983 does not support claims based on a theory of respondeat superior.

---

<sup>1</sup> Two additional defendants, Deputy Sheriff R.T. Boswell and Deputy Sheriff J.D. Goyne, have not filed motions to dismiss in this matter.

## I

On March 18, 2003, plaintiff was target shooting on his property when his neighbor John Ivory called the Bedford County Sheriff's office to complain that plaintiff was shooting at him. Compl. ¶ 6-7. Deputy R.T. Boswell arrived at the plaintiff's house to investigate. Compl. ¶ 7. During the investigation, plaintiff exercised his Fifth Amendment right to remain silent and Sixth Amendment right to counsel. Id. Deputy Boswell allegedly became angry and told plaintiff he was not free to leave. Id. After interviewing witnesses, the Deputy left the scene without making any arrests or collecting evidence. Id.

Plaintiff alleges Ivory later appeared before a magistrate who refused to issue a warrant. Compl. ¶ 8. Ivory then contacted Deputy Goyne to give his statement. Id. at ¶ 9. Deputy Goyne consulted with Deputy Boswell and then sought the advice of Commonwealth's Attorney Randy Krantz. Id. at ¶ 9. Commonwealth's Attorney Randy Krantz advised the officers that there was probable cause to seek a warrant based on Ivory's complaints. Id. at ¶ 9. Deputy Goyne thus appeared before a magistrate who issued a warrant for plaintiff's arrest, charging violations of Virginia Code §§ 18.2-51, 53.1.<sup>2</sup> Id. at ¶ 9. A search warrant was also executed, and plaintiff's firearms were seized. Id. at ¶¶ 10, 12.

These charges were dismissed at a July 7, 2003 preliminary hearing. Compl. ¶ 13. However, the grand jury indicted plaintiff on August 1, 2003, and plaintiff was again arrested.

---

<sup>2</sup> Va. Code Ann. §§ 18.2-51: If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kills, he shall ... be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Va. Code Ann. §§ 18.2-53.1: It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, forcible sodomy, inanimate or animate object sexual penetration ....

Id. at ¶ 14. Plaintiff was then acquitted of all charges by the Bedford County Circuit Court. Id. at ¶ 16.

The crux of Plaster’s complaint is his allegation that he was arrested and prosecuted because he exercised his Fifth and Sixth Amendment rights during the initial investigation. Compl. ¶ 20. Plaintiff claims defendants knowingly used false statements to find probable cause to arrest him and admitted on a number of occasions that they did not have the requisite probable cause. Id. at ¶¶ 21, 23. Plaintiff cites a phone conversation in which a deputy sheriff stated that in Bedford County, exercising your constitutional rights gets you “hooked up.” Id. at ¶ 11. Plaintiff also claims defendants withheld exculpatory evidence and seized his firearms for revenge. Id. at ¶ 27- 29.

Defendant Krantz filed a motion to dismiss in this matter on the grounds of immunity. Krantz claims Eleventh Amendment immunity, absolute immunity, and qualified immunity. Def. Krantz’s Mot. Dismiss ¶¶ 1-3. Defendant Brown also filed a motion to dismiss, asserting plaintiff’s complaint fails to allege defendant Brown personally took any actions to violate plaintiff’s rights. Def. Brown’s Mot. Dismiss ¶ 1. Because § 1983 claims do not support respondeat superior theories, defendant Brown states plaintiff’s claim against him must be dismissed. Id. at ¶ 3.

As plaintiff has filed a response in opposition to both defendant Krantz’s and defendant Brown’s motions to dismiss, this case is ripe for adjudication.

## II

The familiar standard for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) allows a court to dismiss claims based on dispositive issues of law. See Hishon v. King & Spalding, 467

U.S. 69, 73 (1984). A 12(b)(6) motion cannot be granted as a matter of law unless “it is clear that no relief could be granted under any set of facts that could prove consistent with the allegations.” Id. The court presumes all factual allegations in the complaint to be true and accords all reasonable inferences to the non-moving party. 2A Moore’s Federal Practice ¶ 12.07[2.5] (2d ed. 1994). In an action brought pursuant to 42 U.S.C. § 1983, a motion to dismiss the complaint for failure to state a claim under Rule 12(b)(6) should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957).

However, the court is not bound to accept as true “conclusory allegations regarding the legal effect of the facts alleged.” Labram v. Havel, 43 F.3d 918, 921 (4th Cir. 1995). While the court liberally construes pro se complaints, Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), it does not act as the plaintiff’s advocate, sua sponte developing statutory and constitutional claims the plaintiff failed to clearly raise on the fact of his complaint. See Brock v. Carroll, 107 F.3d 241, 243 (4th Cir. 1997) (Luttig, J., concurring); Cochran v. Morris, 73 F.3d 1310, 1314 (4th Cir. 1996) (en banc); Beaudett v. Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

At the oral argument on the motion to dismiss, Plaster offered to provide certain documents to support his allegations. None of these documents changes the legal sufficiency of his complaint, rather the documents reflect Plaster’s version of the facts. Nevertheless, considering these facts in the light most favorable to Plaster, his allegations fail to state a legal claim as to either Krantz or Brown.

### III

#### A. Defendant Commonwealth's Attorney Randy Krantz.

Title 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983.

At the September 20, 2005 hearing, plaintiff stated that he filed this § 1983 action against Krantz in both his official and individual capacities. Yet the face of plaintiff's complaint is silent as to capacity. The Fourth Circuit has held that a plaintiff need not expressly plead the capacity in which he is suing a defendant in order to state a cause of action under § 1983. Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995).

Circuits have split over the proper course of action to take when plaintiff's § 1983 claim is silent as to capacity. Id. at 59-60. The Sixth and Eighth Circuits presume that defendant is only being sued in his official capacity if the complaint does not state otherwise. Id. at 59-60. A majority of circuits, including the Fourth Circuit, look to the substance of the plaintiff's claim, the relief sought and the course of the proceedings to determine the nature of a § 1983 suit when plaintiff fails to allege capacity. Id. at 59.

In this case, the question of capacity need not be resolved. For the reasons stated herein, this court finds plaintiff's claims against defendant Krantz in both his official and individual capacities must be dismissed.

## 1. *Eleventh Amendment Immunity.*

The Eleventh Amendment of the United States Constitution states: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The United States Supreme Court has interpreted the Eleventh Amendment to bar suits by citizens against their own state in federal court. Hans v. Louisiana, 134 U.S. 1, 15 (1890). Courts have extended this Eleventh Amendment immunity to state agencies considered “arms of the state” and state employees acting in their official capacity. Harter v. Vernon, 101 F.3d 334, 337 (4th Cir. 1996); Dawkins v. Craig, 483 F.2d 1191, 1194 (4th Cir. 1973).<sup>3</sup>

The Fourth Circuit has outlined a four-part non-exclusive test to determine whether a state official is immune under the Eleventh Amendment. Ram Ditta v. Md. Nat’l Park & Planning Comm’n, 822 F.2d 456 (4th Cir. 1987). The first and most important consideration is whether the state treasury will pay any judgment that might be awarded. Id. at 457. Further, the court is to consider whether the state entity exercises a significant degree of autonomy from the

---

<sup>3</sup> Exceptions to Eleventh Amendment immunity do not apply in this case. State sovereign immunity may be overcome if Congress specifically legislates to abrogate Eleventh Amendment immunity. Quern v. Jordan, 440 U.S. 332, 341 (1979) (holding § 1983 legislation does not abrogate sovereign immunity). Additionally, a state may voluntarily waive its sovereign immunity. Waiver can be found only where stated by the most express language or by implications from the text which leave no room for any other reasonable construction. Fla. Dep’t of Health & Rehab. Serv. v. Fla. Nursing Home Ass’n, 450 U.S. 147, 150 (1981) (citing Edelman v. Jordan, 415 U.S. 651 (1974)). Finally, the Eleventh Amendment does not bar suits against state officials to enjoin ongoing violations of federal law. Ex Parte Young, 209 U.S. 123 (1908). As plaintiff seeks monetary damages in this suit, this exception does not apply to this case.

state, whether it is involved with local versus state-wide concerns, and finally, how it is treated as a matter of state law. Harter, 101 F.3d at 337 (citing Ram Ditta, 822 F.2d at 457-58).

In Virginia, the Commonwealth's Attorney is a constitutional officer of the Commonwealth. VA. CONST. art. VII, § 4; Va. Code. Ann. § 15.2-1600; Burnett v. Brown, 194 Va. 103, 105 (1952) ("Attorneys for the Commonwealth are constitutional officers."). The Commonwealth of Virginia funds a risk management plan for constitutional officers, which is administered by the Department of the Treasury's Division of Risk Management ("Division"). Va. Code Ann. § 2.2-1839. The plan protects against liability imposed by law for damages against any constitutional officers of the Commonwealth. Id. The Division assumes sole responsibility for plan management, compliance and removal, and the State Compensation Board must approve constitutional officers' participation in the risk management plan. Id. The Division provides for the legal defense of participating entities, and a trust fund is established for payment of claims covered under such plan. Id. Funds are invested into this trust according to Va. Code Ann. § 2.2-1806, which provides for the investment of funds in the state treasury. Id. Thus, the Virginia Department of the Treasury is responsible for paying any judgment that may be awarded in this action, as claims are paid from a trust funded by the state treasury.

The three remaining factors of the Ram Ditta test support the notion that the Commonwealth's Attorney is an arm of the state. The Commonwealth's Attorney's term, duties and authority are created by statute. Va. Code Ann. §§ 15.2-1626, 1627. The Commonwealth's Attorney's salary is prescribed by and paid by the Commonwealth, and his primary duty is to prosecute violations of state laws. Va. Code Ann. §§ 2.2-1627, 1627.1. Because the Commonwealth's Attorney is clearly a constitutional officer of the Commonwealth and an arm

of the state, defendant Randy Krantz is entitled to sovereign immunity pursuant to the Eleventh Amendment. Accordingly, any claims asserted against defendant Krantz in his official capacity must be dismissed.

## **2. *Absolute Immunity.***

To the extent that plaintiff is asserting his claim against defendant Krantz in an individual capacity, such a claim must also fail. Defendant Krantz is entitled to absolute immunity in his role as an advocate for the Commonwealth.

Although in most cases qualified immunity is sufficient to protect officials who are required to exercise discretion, the Supreme Court recognizes that some officials perform special functions which deserve absolute protection from damages liability. Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993). However, the Supreme Court has been quite sparing in its recognition of absolute immunity and has refused to extend it any further than its justification would warrant. Burns v. Reed, 500 U.S. 478, 487 (1991). The official seeking immunity bears the burden of showing immunity is justified. Id. at 486. Courts have adopted a functional approach to the question of absolute immunity, focusing on the nature of the function performed and not the identity of the actor who performed it. Buckley, 509 U.S. at 269, 271.

The Supreme Court used this functional approach in Imbler v. Pachtman, 424 U.S. 409 (1976). In Imbler, the Court held that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties. Id. at 420. The threat of § 1983 suits would otherwise undermine the performance of a prosecutor's duties and perhaps jeopardize the ultimate fairness of the entire system. Id. at 424, 427. To deny a prosecutor such immunity would disserve the broader public interest. Id. at 427. However, as the Court admits,

this leaves a genuinely wronged defendant without civil redress against a prosecutor whose dishonest actions deprived defendant of his liberty. Id. at 427.

The Imbler decision affords prosecutors absolute immunity while initiating prosecution and presenting the state's case at trial. Later in Buckley, the Supreme Court held that acts involving a search for clues and corroboration that may lead to probable cause for arrest are investigative in nature and are not entitled to absolute immunity; the same acts performed by a police officer would only be afforded qualified immunity. Buckley, 509 U.S. at 273. The Supreme Court in Imbler failed to mark the line between investigative acts and acts in preparation for trial. Imbler, 424 U.S. at 430-31. Thus, the boundaries of the Imbler decision extend only as far as initiating a prosecution and conduct in the courtroom. Buckley, 509 U.S. at 272. Actions taken by the prosecutor while preparing for the initiation of judicial proceedings, which occur in his role as an advocate for the state, are entitled to absolute immunity. Id. at 273. Absolute immunity protects decisions integrally related to the charging process. Springmen v. Williams, 122 F.3d 211, 212 (4th Cir. 1997).

In Burns, the Supreme Court held that a prosecutor's appearance before a judge to present evidence in support of a motion for a search warrant falls within the prosecutor's role as an advocate for the state and is not investigative in nature. Burns, 500 U.S. at 491. The Court found that the issuance of a search warrant was clearly a judicial act entitled to absolute immunity. Id. at 492. The judicial system is itself a check on prosecutorial actions at probable cause hearings. Id. at 492. Safeguards in the system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. Id. at 492.

In Springmen, the Fourth Circuit held the decision as to whether and when to prosecute falls squarely under the Supreme Court's decision in Imbler and is entitled to absolute immunity. Springmen, 122 F.3d at 213. It is difficult to imagine conduct more intimately related to the judicial process than a prosecutor's decision to proceed with the prosecution. Id. at 213.

Plaintiff in this case complains that defendant Krantz relied on Ivory's allegedly untruthful statements when advising Deputy Goyne there was probable cause to seek a warrant from the magistrate. Compl. ¶ 9, 21.<sup>4</sup> Plaintiff claims defendant Krantz knew that there was no probable cause for arrest. Compl. ¶¶ 9, 21, 23. Plaintiff classifies Krantz's actions as investigative in nature. Pl.'s Opp. To Krantz's Mot. Dismiss ¶ 2.

Contrary to plaintiff's assertions, Krantz's actions constitute the initiation of prosecution, not an investigation of the matter, and thus are protected by prosecutorial immunity under Imbler. Cf. Buckley, 509 U.S. at 275 (prosecutor was not entitled to absolute immunity where his alleged fabrication of evidence occurred during the investigation, well before a special grand jury was empaneled to conduct a more thorough investigation and months before the suspect was even arrested); Burns, 500 U.S. at 492, 496 (holding prosecutor's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing are protected by absolute immunity but declining to extend absolute immunity to prosecutor who advised police to use hypnosis as an investigative technique); Wadkins v. Arnold, 214 F.3d 535,

---

<sup>4</sup> Plaintiff also accuses defendant Krantz of delaying the preliminary hearing and engaging in malicious prosecution of the case. Compl. ¶ 13-14. Any claims plaintiff makes as to Krantz's decisions in prosecuting this case and presenting evidence to the court must be dismissed, as such actions fall squarely within the ambit of Imbler and thus are protected by absolute immunity.

538 n.5 (4th Cir. 2000) (prosecutor's decision to authorize the prosecution should be protected by absolute immunity).

As noted in Buckley, a “prosecutor neither is, nor should consider himself to be, an advocate *before* he has probable cause to have anyone arrested.” Buckley, 509 U.S. at 274 (emphasis added). Defendant Krantz did not engage in a search for clues or other evidence in order to find probable cause to seek an arrest warrant, as an investigating officer does. Instead, he found that Ivory's statement gave rise to probable cause, and advised the deputies accordingly. The magistrate did in fact issue a warrant based on the evidence presented to him. It is noteworthy that a neutral judicial officer determined that sufficient probable cause existed to support the arrest of plaintiff. See, e.g., Wadkins, 214 F.3d at 541 (finding a detective's conference with the Commonwealth's Attorney and subsequent issuance of warrants by a neutral and detached magistrate weighed heavily toward a finding that the detective was immune); Torchinsky v. Siwinski, 942 F.2d 257, 262 (4th Cir. 1991) (“When a police officer protects a suspect's rights by obtaining a warrant from a neutral magistrate, the officer should, in turn, receive some protection from suit under 42 U.S.C. § 1983.”)

This court believes defendant Krantz's decision to initiate prosecution in this case was a reasonable one. When faced with a complaining witness who claims he feared for his life, Krantz credited this testimony and acted prudently in advising the deputy to seek a warrant. Krantz was entitled to credit such testimony. Compare Gomez v. Atkins, 296 F.3d 253, 264 (4th Cir. 2002) (granting qualified immunity to deputy sheriff and finding deputy was entitled to disbelieve alibi of suspect in determining the existence of probable cause) with Kalina v. Fletcher, 522 U.S. 118, 129 (1997) (prosecutor making false statements of fact in affidavit

supporting application for arrest warrant was not entitled to prosecutorial immunity). A claim of malicious wounding is a serious matter and was taken seriously by the Commonwealth's Attorney. Krantz was not engaged in the investigation of this matter. He was instead acting as an advocate for the Commonwealth in recommending to the deputies that they seek an arrest warrant in this case. As this act initiated prosecution, defendant Krantz is protected by absolute immunity.

### 3. *Qualified Immunity.*

Even if Krantz were not entitled to absolute immunity in this case, the charges against him must be dismissed on the basis of qualified immunity. A prosecutor is entitled to qualified immunity when performing investigative or administrative functions. See Buckley, 509 U.S. 259; Burns, 500 U.S. 478.

Government officials performing discretionary functions are shielded from civil liability to the extent their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Burns, 500 U.S. at 495. Qualified immunity is meant to protect individuals operating in a gray area. Springmen, 122 F.3d at 214 (quoting Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992)) (“Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”). When examining the issue of qualified immunity, a court must (1) identify the specific right allegedly violated; and (2) determine whether, at the time of the alleged violation, the right was so clearly established that a reasonable person in the official's

position would have recognized the illegality of his actions. See Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992) (citing Harlow, 457 U.S. at 815-19).

The threshold inquiry in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation. Hope v. Pelzer, 536 U.S. 730, 736 (2002). Plaintiff alleges defendant violated the Second, Fourth and Fourteenth Amendments of the United States Constitution by advising Deputy Goyne that sufficient probable cause existed to seek warrants before a magistrate. Compl. ¶ 4. Plaintiff claims defendant Krantz ignored the lack of evidence collected during the initial investigation by Deputy Boswell at 5:00 p.m. and relied on Ivory's false statements in determining the existence of probable cause. Id. at ¶¶ 9-10. The question, however, is not whether probable cause actually existed at the time defendant Krantz advised the deputies, but whether Krantz could reasonably have believed probable cause to exist. Gomez, 296 F.3d at 261-62. According to the Supreme Court in Malley v. Briggs, only where the warrant application is so lacking in probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. Gomez, 296 F.3d at 262 (citing Malley v. Briggs, 475 U.S. 335, 344-45 (1986)).

Probable cause exists when the facts and circumstances within an officer's knowledge, or of which he possesses reasonably trustworthy information, are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed. Wadkins, 214 F.3d at 539. The court must examine a totality of the circumstances. Gomez, 296 F.3d at 262 (citing Taylor v. Waters, 81 F.3d 429 (4th Cir. 1996)). Probable cause demands more than a mere suspicion, but evidence sufficient to convict a suspect is not required. Id. at 262 (citing Taylor, 81 F.3d 429).

Even considering plaintiff's allegations in the light most favorable to him, Krantz is entitled to qualified immunity. As plaintiff states, Krantz knew Ivory and plaintiff had disputes in the past. Compl. ¶ 26; Pl.'s Mem. In Support of Pl.'s Opp. To Dismiss/Immunity 12. Though plaintiff claims this should have tipped Krantz off to Ivory's ulterior motive, this knowledge actually tends to support Ivory's statements in that plaintiff may have had a motive to shoot at his neighbor, as Ivory so claimed. Plaintiff claims Krantz knew two others witnessed the incident; thus it also follows that Krantz must have been aware that plaintiff had been shooting his guns in his backyard on the day in question. Compl. ¶ 25, 28. Finally, Krantz knew two complaining witness, Mr. and Mrs. Ivory, stated plaintiff shot at them. Compl. ¶ 9. At such an early stage of the prosecution of this case, Krantz was entitled to credit the Ivories' statements. Circumstances surrounding these statements could lead a reasonable person to find probable cause for arrest. Even assuming plaintiff's allegations are all true, no constitutional violation has been established and defendant Krantz is protected by qualified immunity.

**B. Defendant Sheriff Mike Brown.**

In order for an individual to be liable under § 1983, it must be affirmatively shown that the official charged acted personally in the deprivation of plaintiff's rights; the doctrine of respondeat superior has no application to this section. Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985) (quoting Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977)); see also Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). Thus, defendant Brown must have had personal knowledge and involvement in the deprivation of plaintiff's rights in order to be held liable.

Plaintiff has not alleged that defendant Brown had any personal involvement in the deprivation of his rights under the Second, Fourth, or Fourteenth Amendments. Instead, plaintiff

alleges that defendant Brown was aware of the Bedford County practice of “hooking up” any suspects who exercise their Fifth and Sixth Amendment rights, and that defendant Brown failed to properly train deputy sheriffs. Pl.’s Opp. To Def. Brown’s Mot. Dismiss ¶¶ 1-3, 6. Plaintiff offers nothing beyond speculation and conjecture to suggest that Brown had any knowledge of any such practice of “hooking up” or of any claimed inadequacy in Brown’s training practices. Defendant Brown was not the arresting officer, nor the investigating officer, nor in any other way involved in the prosecution or investigation of this case.

Plaintiff alleges that “at all times, Defendants R.T. Boswell and J.D. Goyne were in uniform, acting under the color of the State, as the alter ego of Sheriff Mike Brown.” Compl. ¶ 18. It is clear from this allegation that plaintiff intends to sue defendant Brown in his capacity as the employer of Deputies Boswell and Goyne, not because he was personally involved in the deprivation of plaintiff’s rights. Plaintiff makes no other mention of Sheriff Brown in his complaint. Because § 1983 does not sustain respondeat superior claims, the claim against defendant Brown must be dismissed.

#### IV

The Clerk is directed to immediately transmit the record in this case to the Honorable Norman K. Moon, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)

as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection.

Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

**ENTER:** This 8<sup>th</sup> day of November, 2005

/s/ Michael F. Urbanski  
United States Magistrate Judge